No. 18-389

In the

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Ninth Circuit's Decision Conflicts With Fifth Circuit Precedent 2

II. The Ninth Circuit's Decision Will Have Wide-Ranging Effects On The OCS 4

III. The Ninth Circuit's Decision Is Incorrect 8

A. State Law Is Applicable Only to Fill Gaps in Federal Law 8

B. California Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bartholomew v. CNG Producing Co.,
832 F.2d 326 (5th Cir. 1987) 3

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 5, 10

Collins v. Overnite Transp. Co.,
105 Cal. App. 4th 171 (2003) 7

Continental Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) 1, 9

Dahlen v. Gulf Crews, Inc.,
281 F.3d 487 (5th Cir. 2002) 4

Fontenot v. Dual Drilling Co.,
179 F.3d 969 (5th Cir. 1999) 3

Gardes Directional Drilling v. U.S. Turnkey Expl. Co.,
98 F.3d 860 (5th Cir. 1996) 4

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 10

Hodgen v. Forest Oil Corp.,
87 F.3d 1512 (5th Cir. 1996) 4

LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 2, 3

Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 2

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 10

Olsen v. Shell Oil Co.,
708 F.2d 976 (5th Cir. 1983) 3

Pac. Operators Offshore, LLP v. Valladolid,
565 U.S. 207 (2012) 10

Powell v. U.S. Cartridge Co.,
339 U.S. 497 (1950) 11

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352 (1969) 9

Shell Oil Co. v. Iowa Dep't of Revenue,
488 U.S. 19 (1988) 8, 10

Ten Taxpayer Citizens Group v. Cape Wind Assocs.,
373 F.3d 183 (1st Cir. 2004) 4

Statute

43 U.S.C. §1333 ..... 8, 9

Other Authorities

Exec. Order No. 13,795, 82 Fed. Reg. 20,815
(May 3, 2017) 6

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program*
(Jan. 2018) https://bit.ly/2lU8cCV 6

U.S. Dep't of the Interior, *Trump Administration Delivers Historic Progress on Offshore Wind* (Oct. 18, 2018),
https://on.doi.gov/2NOwIBc 7

REPLY BRIEF

Respondent's brief underscores the need for this Court's review. He concedes at least one circuit split, and that the workers on platforms near California will be governed by a radically different wage-and-hour regime (with their every on-platform hour compensated) from offshore workers elsewhere, and that the Ninth Circuit's OCSLA analysis is no different from ordinary preemption analysis. And his efforts to deny the depth of the circuit split or the importance of the issue are unavailing. *Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Ass'n*, 417 F.2d 1030 (5th Cir. 1969), and its gap-filling/necessity analysis remain good law throughout the old Fifth Circuit. Respondent's effort to suggest otherwise cannot explain the Fifth Circuit's extant caselaw or the absence of any decision purporting to overrule *Continental Oil*, and Respondent does not even try to argue that any subsequent Eleventh Circuit decision displaces *Continental Oil*. As to importance, Respondent may be correct that there are more automobile dealers than offshore platforms, but the question of the applicable law on the OCS was sufficiently important for Congress to enact OCSLA, which even Respondent concedes was enacted in part to protect offshore drilling revenues. Thus, it is hard to imagine an OCSLA case that is more important or more deserving of this Court's review. The circuits are split, the stakes are high, and the Ninth Circuit's view that state law applies on the OCS whenever it would apply in Fresno is profoundly wrong. This Court should grant plenary review.

I. The Ninth Circuit's Decision Conflicts With Fifth Circuit Precedent.

Respondent does not dispute that the decision below is inconsistent with the Fifth Circuit's decision in *Continental Oil*, or that *Continental Oil* continues to bind the Eleventh Circuit. His attempts to cast doubt on *Continental Oil*'s vitality within the Fifth Circuit are flawed.

He first argues that *Continental Oil* governs only maritime cases, and thus would not apply to a non-maritime case like this. Opp.11-12. That bewildering contention ignores *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), which straightforwardly applied the *Continental Oil* test in a "non-maritime" context—namely, to a platform worker's personal-injury case. *Id.* at 585. Despite that non-maritime context, the Fifth Circuit reaffirmed *Continental Oil*'s holding that "there must exist a gap before state law can be applicable," *id.*, and held that state law was inapplicable because "there is no gap—not even a tiny one," *id.* at 589.

Respondent claims that *Nations* did not turn on the meaning of "applicable," but rather on a determination that state law was "inconsistent with" federal law. Opp.13. That is obviously inaccurate. In *Nations*, the Fifth Circuit squarely held that state law was not "applicable" because "there is no gap" in federal law. 483 F.2d at 589. Indeed, the heading of the relevant portion of the opinion is: "UNNECESSARY—HENCE INAPPLICABLE." *Id.* Respondent makes a similar claim about *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), but there too, the Fifth Circuit held that "'applicable' must

be read in terms of necessity ... to fill a significant void or gap," and "such a gap does not exist in this case." *Id.* at 509.

Respondent asserts that Fifth Circuit cases have adopted state law as surrogate federal law "even when a comprehensive federal statutory scheme would otherwise govern." Opp.14. The cases he cites do not support that assertion. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), considered whether a state pre-judgment interest rule applied. The court held that it did, but only after determining that federal law was "silen[t]"on the relevant question—*i.e.*, that there was a federal-law gap. *Id.* at 984. *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987), involved the same issue and reached the same result. And *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999), assessed whether a state-law comparative-fault rule applied to a negligence action. The court held that it did, but only after determining that the federal Longshore and Harbor Workers Compensation Act was "inapplicable" because its third-party fault provisions applied only when a vessel was involved, and none was. *Id.* at 977.

Respondent insists that the *PLT* test must have supplanted the *Continental Oil* test because the Fifth Circuit has applied it even when "there are potentially applicable ... federal laws." Opp.15. But Respondent ignores entirely the commonsense point that *PLT* was exceedingly unlikely to implicitly overrule or eviscerate *Continental Oil* when *the same judge wrote both opinions.* In all events, in the cases Respondent cites, no "potentially applicable" federal laws are apparent. *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487

(5th Cir. 2002), is a negligence case about a plaintiff who "injured his back aboard an oil platform while unloading groceries." *Id.* at 490. *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996), involved "the enforceability of a standard indemnity clause." *Id.* at 1515. *Gardes Directional Drilling v. U.S. Turnkey Expl. Co.*, 98 F.3d 860 (5th Cir. 1996), addressed whether lienholders could pursue remedies against property owners. *Id.* at 865.

Continental Oil remains the binding law of the Fifth and Eleventh Circuits, and respondent does not dispute the resulting conflict with the decision below or identify any vehicle problems that would prevent this Court from resolving that conflict.[1]

II. The Ninth Circuit's Decision Will Have Wide-Ranging Effects On The OCS.

The decision below will have a substantial and harmful effect on oil-and-gas operations on the OCS, as reflected by the sizable group of companies and trade associations joining the industry amicus brief. *See* Freeport.1-2. Respondent's attempt to minimize the impact ignores the importance of the OCS to Congress, the importance of platform operations to the OCS, and the impact of applying California's anomalous wage-and-hour laws to the OCS.

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[1] Respondent claims that *Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC*, 373 F.3d 183, 194 (1st Cir. 2004), applied a test similar to the Ninth Circuit's. Opp.8-10. That would turn a 2-1 split into a 2-2 split, which would only increase the case for review. But *Ten Taxpayer* concluded that federal law "leaves no room for states to require licenses or permits for the erection of structures on the seabed." *Id.* at 196-97.

First, Respondent's attempt to minimize the universe of workers impacted by the decision below ignores the importance Congress placed on the OCS generally and applying federal law to the OCS in particular. While Respondent is no doubt correct that automobile dealerships outnumber offshore drilling platforms, that ignores that issues concerning the OCS were important enough for Congress to enact an entire statute (and for this Court to review numerous OCSLA cases). Moreover, concerns that these platforms, where people would work and sleep, have a predictable set of legal rules was at the heart of Congress' concerns. And, as Respondent himself highlights, Congress was specifically concerned with protecting the revenues of offshore operations. While the immediate concern was precluding state-law taxation, state laws forcing compensation for every hour (waking or unwaking) pose an equal threat to offshore revenues. Thus, this case implicates Congress' core concerns in enacting OCSLA, and, given the circuit split and financial stakes, it is as consequential as any OCSLA case this Court is likely to see. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 98-99 (1971) (addressing statutes of limitations under OSCLA for "injuries occurring on fixed structures on the [OCS]").

Furthermore, Respondent's suggestion that this case affects only members of drilling crews on 23 platforms near California is flawed. Opp.26. To begin with, the decision below affects not just drilling crews, but also the employees of the numerous contractors providing a variety of services on platforms, including transportation, maintenance, repairs, surveying, food

service, and cleaning. *See* Freeport.16-17.[2] Additionally, the decision below applies to the extensive drilling activity off the coast of Alaska, and although Respondent suggests that Alaska law mirrors federal law in *some* respects, he ultimately admits (as he must) that Alaska applies a distinct hours-per-day test for overtime, Opp.27-28, which is a misfit on the OCS, *see* Chamber.5 n.3.

Moreover, the scope of OCS activity, and the importance of a clear and predictable legal regime, will only increase. The federal government recently emphasized that it is "the policy of the United States to encourage energy exploration and production ... on the" OCS. Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017). Its most recent proposal "would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019–2024 period," including areas off the coast of *every* coastal State. *See* U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* (Jan. 2018) at 1, 8-9, https://bit.ly/2lU8cCV; *see also* Freeport.18, 23-24 (emphasizing importance of uniform federal rules to facilitate this expansion). Similarly, the federal government recently announced that over 1,000 square miles of the OCS off the

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[2] Respondent suggests that platform operators can adopt "alternative workweek schedules" under California law. Opp.28-29. But no definition of "workweek" could relieve employers from the California-law requirement to pay for all hours (including sleep) spent on the platform. Since it is impractical and unsafe to ferry workers back to shore every day, California's alternate-workweek law does not solve the problem presented here.

California coast may be made available for offshore wind farms. *See* U.S. Dep't of the Interior, *Trump Administration Delivers Historic Progress on Offshore Wind* (Oct. 18, 2018), https://on.doi.gov/2NOwIBc.

Respondent claims that employers were on notice that California law applied on the OCS, citing 1999 legislative hearings. Opp.29-32. But those hearings did not address the OCS. In 1999, California enacted sweeping legislation that extended an hours-per-day overtime test to drilling industry employees, most of whom worked *on*shore or in *state* "offshore" waters landward of the OCS. *See Collins v. Overnite Transp. Co.*, 105 Cal. App. 4th 171, 176 (2003). Industry representatives sought an industry-specific wage order to address their *on*shore and state-jurisdictional "offshore" operations, not because the legislation would supplant federal law on the OCS.

Respondent touts that some collective bargaining agreements between OCS employers and employees incorporate state-law standards. Opp.32-33. But CBAs are free to incorporate any law the parties want, whether from the adjacent state, another state, or federal law. And whatever law is adopted is a product of bargaining, not Sacramento's fiat. Parties are free to accept some aspects of state law (say, wage rates) but not others (say, rules requiring compensation for every on-platform hour). In all events, parties should be able to negotiate against a default rule that is clear and uniform, not one that applies state law in the Ninth Circuit and federal law in the Fifth and Eleventh Circuits.

Ultimately, Respondent cannot deny the reality that, absent review, workers off the California coast

will enjoy a radically different wage-and-hour regime than those off the Gulf Coast. Companies operating in both venues will have to deal with one set of employees entitled to round-the-clock compensation while the balance are subject to the FLSA's more sensible approach. If the Ninth Circuit is correct, then employers will have no choice but to adjust. But employers should not be forced to deal with this massive disruption to their compensation practices without this Court's review.

III. The Ninth Circuit's Decision Is Incorrect.

Respondent's efforts to defend a Ninth Circuit regime where all state law presumptively applies to the OCS (without regard to any gap in federal law) and is inconsistent with federal law only if preempted are unavailing.

A. State Law Is Applicable Only to Fill Gaps in Federal Law.

Respondent's arguments are premised on an imagined *status quo ante* in which state law reigned unquestionably supreme on the OCS, and OCSLA reflected a modest effort to nudge state law aside in limited circumstances principally concerning taxation. *See, e.g.*, Opp.4 ("Congress did not intend to displace all state law as a substantive matter on the OCS.").[3] In reality, OCSLA was Congress' first (and

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[3] Respondent cites *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19 (1988), for the proposition that OCSLA's "exclusive[] concern" "was prohibiting adjacent states from imposing taxes on OCS oil production." Opp.4; *see* Opp.26. In reality, *Shell Oil* explained that prohibiting direct state taxation was the "exclusive[] concern" of *one sentence* of §1333(a)(2)(A), 488 U.S. at 29-30. The principal concern of OCSLA as a whole "was to define

only) effort to establish the applicable law on the OCS, and it unequivocally made federal law "exclusive," with state law never applicable of its own force and "used only" as the basis for a federal rule of decision "to supplement federal law." *Rodrigue*, 395 U.S. at 358-59. Congress *rejected* proposals that would have treated the OCS as if it were part of the adjacent state, deciding *against* "supremacy of state law administered by state agencies." *Cont'l Oil*, 417 F.2d at 1036. Respondent nonetheless never denies that the Ninth Circuit has embraced the exact same choice-of-law regime that Congress rejected. *See* Pet.28, 34.

The problems with Respondent's (and the Ninth Circuit's) view do not end there. As the Fifth Circuit highlighted in *Continental Oil*, Respondent's interpretation would render the word "applicable" superfluous, with the only inquiry focusing on whether state and federal law were inconsistent. Pet.28. Respondent's feeble effort to brush away that significant concern is tellingly buried in a footnote. *See* Opp.22 n.6. He claims that Congress included the word "applicable" only to avoid confusion between OCSLA's basic choice-of-law provision and a subsection providing that "State taxation laws shall not apply to the outer Continental Shelf," §1333(a)(2)(A). That is fanciful. No one could possibly be confused by the words "shall not apply," and Congress' effort to supply a general choice-of-law rule should not be distorted (in a pro-state-law direction)

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a body of law applicable to the [OCS]," namely, "federal law." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355-56 (1969).

by a provision making clear beyond cavil that state law should not apply in one context.

Respondent claims that §1333(a)(2)(A) "states that *all* the civil and criminal laws of each adjacent state 'are ... declared to be the law of the United States.'" Opp.20. But the statute does not say that; it says that state laws become surrogate federal law only "[t]o the extent that they are applicable and not inconsistent with" federal law. §1333(a)(2)(A). The difference is fundamental. The former would amount to the regime Congress rejected; the latter is consistent with a regime where all law is federal but state law provides the rule of decision on subjects not independently addressed by federal law.

Respondent asserts that this Court has used the term "applicable" in a manner consistent with the decision below. Opp.17-19. That is incorrect. In *Huson*, a personal-injury case, everyone agreed that "there exists a substantial 'gap' in federal law." 404 U.S. at 101. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), the language respondent cites addresses only the distinct question of which state is "adjacent." *Id.* at 485-486. Respondent's other citations are even further afield. *See Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012) (interpreting §1333(b), not §1333(a)); *Shell Oil*, 488 U.S. at 32 (states can include OCS-derived income in tax base); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220 (1986) (OCSLA inapplicable).

Finally, respondent claims that "[n]o decision of this Court has required a significant void or gap in federal law before the law of the adjacent state may become applicable." Opp.22. But that is exactly what

this Court held in *Rodrigue*. *See* Pet.24-25. The decision below thus conflicts not only with Fifth and Eleventh Circuit precedent, but also with this Court's precedent.

B. California Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes.

Respondent doubles down on the Ninth Circuit's fundamentally misguided view that state law is not "inconsistent" with federal law for OCSLA purposes so long as it would not be preempted. But that view treats the OCS no different from Fresno and injects federalism considerations into a context (the OCS) where they are fundamentally misplaced. To all this, Respondent has no answer.

Nor does he dispute that California law differs from the FLSA on almost every major subject covered by wage-and-hour law: hours worked, sleep time, overtime, minimum wage, employee status, and more. *See* Pet.32-34; Chamber.3-8. He nonetheless insists that California law is "not inconsistent with" the FLSA because the latter has a savings clause. Opp.22-26. But the FLSA includes a savings clause for the entirely applaudable reason of accommodating States' primary and plenary authority to regulate working conditions within their own jurisdictions, not to facilitate a regime of duplicative and inconsistent regulations on the exclusive federal enclave that is the OCS.

Respondent points out that the savings clause preserves "*federal* legislation affecting labor standards," like the Portal-to-Portal Act. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 518 (1950) (emphasis

added). Respondent thus ambitiously argues that after California law becomes surrogate federal law under OCSLA, it is preserved by §218's reference to federal law. Opp.25. That puts the cart before the horse: state law becomes surrogate federal law only *after* a court determines that it is applicable and not inconsistent with federal law. Moreover, Congress could save other federal laws because it was unlikely to enact flatly contradictory laws on the exact same issue. The Portal-to-Portal Act, for example, addressed a specific concern with massive retroactive liability (a concern implicated by the decision below) without otherwise repealing any federal law. If, however, Congress first passed a federal law *not* requiring compensation for sleeping hours and then enacted a second law requiring compensation for those same sleeping hours, the laws could only be understood as inconsistent, with the latter implicitly repealing the former. So too if California wage-and-hour law were treated as federal law, which is why it is "inconsistent with" the FLSA for OCSLA purposes and inapplicable to the OCS. The Ninth Circuit's contrary ruling is deeply flawed and should be reviewed and reversed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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